1711. *December* 14. WILLIAM COCKBURN of CAULDRA *against* ADAM GRAY.

ADAM Gray, feuar in Dunse, being debtor to William Nisbet, flesher there, in £457, by bond; Nisbet, in his testament, nominates William Cockburn of Cauldra, his executor, and, amongst other legacies, he leaves and bequeaths the said L.457 bond to William Gray, son to the said Adam, and assigns him specially to it. Cauldra confirms the testament, and charges Adam the father, with horning, to pay to him the sum of the bond; who gives in a complaint to the Lords, That the horning and charge was most unwarrantable; for, *in græmio* of the same testament making you executor, is my legacy ingrossed; so you can never misken it, and was *in pessima fide* to seek it up, when, at the same moment, I could force you to give it back again, *nam frustra petis quod mox es restituturus*. If it had been in a separate codicil, you might pretend ignorance; but being incorporated with your own right, it makes you inexcusable. And, as to general legacies, though executors may uplift them, and the legatars are to get them *ab ejus manu;* but where it is special of an individual subject, the property and dominion is directly stated in the legatee, that he can *rei vindicatione* recover it. And, as he has the *incommodum*, if the subject perish, or the debtor turn insolvent, he has no warrandice against the executor to make it up, but it perishes to him: so he ought to have the benefit of enjoying it, free of all defaulcation or abatement, except in the case where the inventory is exhausted by debts. And it was both illegal and unjustifiable in him to charge for the debt, when he knew he was obliged, by the defunct testator's order, to deliver up the bond: for, where one legates to the debtor himself his own debt, that is called *legatum liberationis;* but when he leaves the bond to a third party, it is called *legatum nominis*. See also the decision, *21st July* 1665, *Spreul* against *Murray*.

ANSWERED for Cauldra the executor,—1*mo*, I have done no wrong in charging you, for I am burdened with several debts, and the prestation of some facts; till which be performed, I know not how far the defunct's effects will answer; and, therefore, you must pay it in to me, till the event tell how far it will be free. 2*do*, I, not being a depender on the house, cannot be thus summarily convened on a bill.

Some thought the executor had the *jus exigendi*, as well as the special legatar, and that the power was cumulative. Others thought the special legatar had immediate access to it, on his finding caution to refund, if the debt exhausted all. But others said, this was not the proper place for trying this fact, and that it would best come in by way of suspension. And therefore they ordained Gray to expede a suspension, without either caution or consignation; which would bring in the whole, and make it appear if the charge was warrantable or calumnious. *Vol. II. Page* 687.

1711. *December* 18. Captain FRANCIS CHARTERS, Complainer.

CHARLES, Master of Elphingston, and Mr John Campbell of Mammoir, the Duke of Argyle's uncle, gave bond to Captain Francis Charters, in the Queen's

Foot-guards; and he resolving to do some diligence on it against the Master of Elphingston, gave in the bond to the register. But the clerk observing that the clause of registration run against both, and that Mr Campbell was a member of the British House of Commons, and registration being a decreet, (though of consent,) none could pass against him during the sitting of Parliament; and, therefore, lest they might be charged with breach of privilege, they refused to registrate the same. Whereon, Charters gave in a bill to the Lords, complaining of the clerk, and declared, he craved only an extract against the master of Elphingston, and *pro tempore* past from Mammoir, and craved out his extract with this restriction.

It was argued among the Lords, that the privilege being personal, it could not cover nor protect another not privileged, even as a minor and a major granting a bond, the minor's restitution will not extend to the major; and even so with a wife and her cautioners: and so *de consortibus ejusdem litis.* Others argued, that the two were coprincipals, and the clause of registration one complex individual act, and could not be divided so as to be registrate against one and not against both: and to registrate it simply against one, wanted a warrant. But, *quæritur*, Might he not gratuitously discharge one of the *correi debendi*, and insist against the other; and if the passing from him *pro loco et tempore* may have the same effect in law. *Vol. II. Page* 688.

1711. *December* 19. The MARQUIS of ANNANDALE *against* The TENANTS of KIRCUDBRIGHT.

THERE being a duty of some mart cows, payable out of the parish of Kirkcudbright, to the Marquis of Annandale, as steward thereof, and a fee and emolument due to that office; and the tenants being charged to pay them, they gave in a bill of suspension on thir reasons,—1*mo*, That these kye were due to him as keeper of the Castle of Threave, and for maintenance of the garrison kept there of old, which is now wholly ruinous and decayed; and, *cessante causa*, the duty must cease.

ANSWERED,—This is a fee and emolument due to the heritable stewards of Kirkcudbright, whereof they have been in possession past memory of man: and it is of no import whether the castle be standing or demolished; for, though these castle-wards and constable fees were originally due for securing the peace of the country, and to defray the King's expense at table, when he came in circuit through the several shires, yet now they are become a part of the subject's property: and the same objection having been made against some kains and casualties payable to the Castle of Lochmaben, now ruinous, it was repelled.

2*do*, ALLEGED,—Their masters held their lands blench of the Queen, *pro omni alio onere*, and so thir lands cannot be burdened with this duty.

ANSWERED,—Though it be not in your charters, yet it is in mine, and confirmed by immemorial possession.

The *third* reason was, The manner of exaction is most illegal and abusive; for officers come, exacting crowns and half-crowns of some, and burdening others.

ANSWERED,—The complaint is calumnious; for the way of uplifting is, that, at the Michaelmas head-court, intimation is made judicially, that they may